



Respondent and its insurance carrier (respondent) contend the ALJ's Order should be affirmed. According to respondent, claimant failed to meet his burden of proving accidental injury arising out of and in the course of his employment, which was the basis for the ALJ's denial.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the arguments, the Appeals Board (Board) finds that the ALJ's Order should be affirmed.

The issues raised in this appeal turn primarily on the credibility of the witnesses' testimony. If claimant is believed, his testimony supports a finding that his work caused an onset of low back pain on July 5, 2002, which worsened to the point that he sought medical treatment on July 7, 2002. Claimant said he reported to his lead man, Michael Simrell, that he had "popped" or pulled a muscle in his back, but he continued working. Mr. Simrell denies claimant said this. In addition, as respondent points out, there are also several inconsistencies in the medical records which tend to undermine claimant's credibility.

It is significant that the ALJ observed the in-person testimony of the witnesses and apparently did not believe the claimant. The Board generally gives some deference to an ALJ's evaluation of the credibility of witnesses whom he or she had the opportunity to observe while testifying. In this case, respondent offers no testimony that would directly contradict claimant's explanation for how he was injured, but respondent does offer evidence that claimant did not report his injury or symptoms to Mr. Simrell in the manner or at the time when claimant said he did and the medical records show a date and a mechanism of injury that differ from claimant's testimony. These inconsistencies could be explained by imperfect memories or by claimant and/or the hospital personnel simply not placing a great deal of significance on such details when claimant was in pain and seeking treatment at the hospital emergency room. Claimant's testimony concerning his injury is consistent with the type of work he performed and there is nothing in the record to suggest an alternative explanation for the injury. Nevertheless, considering the record as a whole, the Board agrees with the ALJ's determination that claimant's testimony lacks credibility and a compensable claim has not been proven.

Claimant's testimony is inconsistent with the histories contained in the various medical records and his allegations are not otherwise supported by the record. It is claimant that bears the burden of proof. The Board finds that claimant has failed to prove his back injury was caused by his work activities with respondent on the date alleged.

As provided by the Act, preliminary hearing findings are not binding but are subject to modification upon a full hearing on the claim.<sup>2</sup>

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Order entered by Administrative Law Judge Jon L. Frobish on October 10, 2002, should be and is hereby affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of January 2003.

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BOARD MEMBER

c: Russell B. Cranmer, Attorney for Claimant  
Kendall R. Cunningham, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Director, Division of Workers Compensation

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<sup>2</sup> The preliminary hearing transcript contains numerous spelling and typographical or transcription errors. The parties should see to it that the certified shorthand reporter makes the appropriate corrections.